(3)

No. 02-240

IN THE

Supreme Court of the United States

RICHARD PEDRONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY MEMORANDUM FOR THE PETITIONER

JAMES A. PLAISTED *
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300

STUART A. SMITH
551 Madison Avenue
New York, New York 10022
(212) 759-8285

* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

30 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE WHETHER THE *CHEEK* DEFINITION OF WILLFULNESS IS APPLICABLE TO TITLE 18 U.S.C. § 371 CONSPIRACIES TO VIOLATE OR OBSTRUCT THE ADMINISTRATION OF THE TAX LAWS.	1
II. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE WHETHER A DEFENDANT IN A CRIMINAL TAX CASE IS ENTITLED TO A JURY INSTRUCTION ON HIS AFFIRMATIVE DEFENSE OF GOOD FAITH RELIANCE ON A TAX PROFESSIONAL'S ADVICE.	7
CONCLUSION	10
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	13a
APPENDIX D	15a

TABLE OF AUTHORITIES

CASES	Page
Andres v. United States, 333 U.S. 740 (1948)	2
Bryan v. United States, 524 U.S. 184 (1998)	6
Cheek v. United States, 498 U.S. 192 (1991)	1, 5, 6
Johnson v. Louisiana, 406 U.S. 356 (1972)	2
Ratzlaf v. United States, 510 U.S. 134, 149 (1994)	6
Richardson v. United States, 526 U.S. 813 (1999)	2
United States v. Cyprian, 23 F.3d 1189 (7th Cir.), *cert. denied*, 513 U.S. 879 (1994)	1
United States v. Derezinski, 945 F.2d 1066 (8th Cir. 1991)	1
United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940)	5
United States v. Jackson, 33 F.3d 866 (7th Cir. 1994)	1
United States v. Regan, 937 F.2d 823 (2d Cir. 1991)	1, 6
STATUTES	
18 U.S.C. §371	1, 3
OTHER AUTHORITIES	
O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §919.08 (2000 ed.)	9

REPLY MEMORANDUM FOR THE PETITIONER

I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE WHETHER THE *CHEEK* DEFINITION OF WILLINGNESS IS APPLICABLE TO TITLE 18 U.S.C. § 371 CONSPIRACIES TO VIOLATE OR OBSTRUCT THE ADMINISTRATION OF THE TAX LAWS

The government does not, for indeed it cannot, deny that there is a square conflict in the circuits on the question whether the definition of willfulness established by this Court in *Cheek v. United States*, 489 U.S. 192, 201 (1991) applies to criminal tax conspiracy cases. The Second Circuit has held that the defendant in a tax conspiracy case is entitled to jury instructions applying the *Cheek* definition of willfulness. *United States v. Regan*, 937 F. 2d 823, 826-827 (2d Cir. 1991). However, the Seventh and Eighth Circuits—and now the Third Circuit in the decision below—have ruled precisely to the contrary, holding that *Cheek* does not apply to tax and *Klein*-type conspiracy cases. *United States v. Cyprian*, 23 F.3d 1189, 1201 (7th Cir.), *cert. denied*, 513 U.S. 879 (1994); *United States v. Jackson*, 33 F. 3d 866, 871 (7th Cir. 1994); *United States v. Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991).

Despite the conflict of decisions on this important question concerning jury instructions in tax conspiracy prosecutions, the government urges (Br. in Opp.6) that this particular case does not warrant plenary review. As the government sees the matter, the conflict is not implicated here because "the jury instructions on the conspiracy count specifically required finding 'a given defendant's knowing and willful participation in' the conspiracy." *Id.*

But the government's contention overlooks the critical defect in the trial court's definition of the essential elements

of the crime of conspiracy. In its instructions, the trial court advised the jury as follows (A623): [1]

> The offense of conspiracy has three essential elements, each of which must be proven beyond a reasonable doubt as to a particular defendant:
>
> First: that two or more persons voluntarily and intentionally entered an unlawful agreement at about the time charged in the Indictment;
>
> Second: that the defendant knowingly and voluntarily became a member of the conspiracy charged;
>
> Third: [requiring] . . . "one overt act."

The foregoing identification of the elements of the offense of conspiracy by the trial court completely omits any reference to "willfulness" as an element of the crime. The elements are of critical legal significance. A jury in a federal criminal case may convict when the government has proven the elements of the offense. *E.g.*, *Richardson v. United States*, 526 U.S. 813, 817 (1999). *Johnson v. Louisiana*, 406 U.S. 356, 369-371 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748 (1948). Hence, as the trial court submitted the case to the jury, it was entirely possible for the jury to have convicted Petitioner for conspiracy without *any* proof that he willfully intended to violate the law. Accordingly, Petitioner's conviction for conspiracy cannot in any event stand.

Indeed, the government concedes as much when it states, in an oblique acknowledgment of the error in this case, "The courts of appeals agree that, where one or more of the charged objects of a conspiracy is a substantive tax offense having willfulness as an element, a willfulness instruction must be given on the conspiracy charge with respect to that object." (Br. in Opp. 7, n. 4) Since Petitioner was charged

---

[1] "A" references are to the joint appendix in the court of appeals. We have lodged a copy of the joint appendix with the Clerk.

with conspiracy to violate four tax-related objects, including the substantive offense of federal excise tax fraud (Pet. App. 5a),[2] his conviction under such manifestly erroneous jury instructions must be set aside.

Recognizing the essential defect of the trial court's jury instructions with respect to the essential elements of the offense of conspiracy, the government falls back upon the general definitions that the court gave the jury in the preamble of the 122 pages of jury instructions before the description of the elements of the offenses. In these general definitions, the trial court stated (A590):

> A person acts "knowingly" if he acts voluntarily and intentionally, and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to ensure that no one will be convicted for an act done because of mistake or accident, or other innocent reason.
>
> A person acts "intentionally" if he or she acts voluntarily or on purpose, and not because of mistake or accident or other innocent reason. The purpose of adding the word "intentionally" is to ensure that no one will be convicted for an act done because of mistake or accident, or other innocent reason.
>
> A person acts "willfully" if he or she acts voluntarily and intentionally and with the specific intent or purpose to do something the law forbids or with the specific intent to omit something the law forbids or with the specific intent to omit something the law requires him or her to do—in other words, with a bad purpose or evil intent to either disobey or disregard the law.

---

[2] All four objects of the 18 U.S.C. § 371 conspiracy violated were tax offenses. The substantive tax offense object was to commit federal excise tax fraud. The *Klein* object was to obstruct the IRS, the mail fraud object was a state tax offense, and the money laundering object was a charge that Petitioner conspired to transport tax fraud proceeds in interstate commerce. (A247-48)

> In determining whether a defendant has acted knowingly and willfully, it is not necessary for the government to establish that he or she knew that he or she was breaking any particular law.

The trial court's general definition of willfulness stands as a disconnected and therefore ineffective appendage in the lengthy overall instructions. As a result, the jury had no frame of reference in which to include the requirement of willfulness in the definition of conspiracy. Hence, the government's suggestion (Br. in Opp. 6) that the element of willfulness "was sufficiently captured by the instructions in this case" is at best disingenuous, or at worst, simply wrong.

The foregoing general definitions were part of the general instructions and guidance for the jury. Thereafter, there were sections of the jury charge devoted to each of the offenses in the indictment, *i.e.*, wire fraud (A595 to 603), money laundering (A604 to 608), federal excise tax evasion (A609 to 20), the Title 18 conspiracy incorporating the four tax-related objectives (A625 to 42), the extortion conspiracy as to the defendant Enright alone (A643 to 49), and the customs violation as to the defendant Enright alone (A649 to 53). The general definitions above were to be used but only in connection with the specific offenses at issue. The fact that a general definition for willfulness was given early in the 122-page legal charge cannot be invoked to save the specific conspiracy instructions which did not include willfulness as an element of the conspiracy.[3]

---

[3] The government relies upon the fact that the trial court mentioned "knowing and willful" in the instructions on conspiracy citing A633. During the 25 pages in which the court described a conspiracy, the court stated:

> Rather, the evidence must show both the existence of the conspiracy and a given defendant's knowing and willful participation in it—that he intended to advance a purpose or object of the conspiracy.

Even assuming *arguendo* that the jury was somehow able to connect the trial court's general definition of willfulness with the instructions, 33 pages later on the essential elements of conspiracy, the court's general definition of willfulness did not incorporate the *Cheek* standard. The last clause of the general definition of willfulness suggesting that a defendant need not know what law was involved permitted a guilty verdict without a defendant's knowledge of the applicable tax laws and regulations (*i.e.*, IRS Notice 88-30). This instruction was the very antithesis of the *Cheek* requirement that a defendant violate a *known* legal duty. The complex rules and regulations applicable to licensed "suppliers" of tax-free No. 2 oil who were selling to similarly licensed buyers are not generally known. Indeed, the government has never even identified the legal duty that Petitioner, as a salesman for a supplier of tax-free No. 2 oil, violated by selling tax-free oil to purchasers who were licensed by the IRS to buy tax free. Oil is a commercial commodity. Oil is not contraband like drugs. Sellers of sugar who sold to buyers who later used the sugar to distill alcohol illegally were held not to be criminally liable in *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). By the same token, what legal duty did Petitioner, a seller of a commercial commodity, have that was different from that of a supplier of any other such commodity such as electricity? The government has never identified that legal duty in this case, even when asked to do so directly by the trial court. (*See* Pet. 5-6)

However, on the very next page (A634,) the court essentially vitiated any impact that its use of the word willfully might have had by stating:

> The Government must prove to you that a particular defendant knowingly and intentionally associated himself or herself with the alleged criminal activity.

At the end of the day, such passing references to willfulness were inadequate to cure the court's failure to include willfulness as an element of the offense.

Here, the government seeks to criminalize Petitioner's conduct in the context of a highly technical body of federal excise tax statutes and IRS procedures. Such a prosecution demands that the jury be instructed in accordance with the heightened *Cheek* standard to avoid convicting individuals engaged in apparently innocent activity, *viz*, selling fuel oil. The instructions that obviated the government's need to prove a knowing violation of specific laws and specific legal duties were defective.

At all events, contrary to the government's contention (Br. in Opp. 7, n. 4), a conspiracy to commit a substantive tax offense and a *Klein* conspiracy to obstruct the IRS are equally aimed at the federal taxing authority and both implicate the element of willfulness to violate specific legal duties imposed by the IRS. Hence, the heightened *Cheek* standard is fully applicable to both types of conspiracies. As the Second Circuit reasoned in *United States v. Regan*, *supra*, 937 F. 2d at 827, the conflicting decision the government conspicuously fails to address, tax laws by their very nature, involve a proliferation of complex statutes and regulations. It therefore does not matter whether a defendant is charged with a conspiracy to commit a substantive tax offense or a conspiracy to obstruct the functions of the IRS. Both types of conspiracies are rooted in this highly technical body of complex statutes and regulations which ordinary persons are not presumed to know. *Accord: Ratzlaf v. United States*, 510 U.S. 134, 149 (1994); *Bryan v. United States*, 524 U.S. 184, 194 and nns. 18, 22. Accordingly, both types of conspiracies required proof of a "voluntary, intentional violation of known legal duty." (498 U.S. at 201).

The decision below—holding that the *Cheek* standard does not apply to either type of conspiracy—is squarely at odds with *Regan* as to *Klein*–type conspiracies. The decision below is also at odds with the government's position before this Court, as to conspiracies to commit substantive tax offenses. The manifest conflict among the courts of appeals,

as well as the conflict between the decision below and the government's present position herein (Br. in Opp. at 8, n. 4) warrants plenary review of this case.

II. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE WHETHER A DEFENDANT IN A CRIMINAL TAX CASE IS ENTITLED TO A JURY INSTRUCTION ON HIS AFFIRMATIVE DEFENSE OF GOOD FAITH RELIANCE ON A TAX PROFESSIONAL'S ADVICE

A. The government does not contest the importance of or the frequency with which the issue of good-faith reliance upon the advice of a tax professional arises in criminal tax cases and other federal financial cases. Nor does the government contest that there is a splintering of authority in the courts of appeals as to when and whether a legal instruction setting forth the elements of the affirmative defense of good-faith reliance is necessary.

However, in opposing review by this Court of this question concerning Petitioner's right to such a jury instruction, the government asserts (Br. in Opp. 8) that "there was no evidentiary basis in this case for an instruction on good-faith reliance." The record, however, is precisely to the contrary. The evidence established that Petitioner unquestionably relied upon his CPA, Ron Suppa, who supervised the tax department of Pedroni Fuel for 20 years. Suppa testified without contradiction that he established the tax practices and procedures at Pedroni Fuel and that Petitioner relied upon his advice and adopted his decisions, that all of the tax decisions on the transactions in this case were made by him after review of all necessary documents and appropriate inquiry and that Petitioner never countermanded him. (*See* App. A, *infra*, pp. 1a-11a).[4] Pursuant to Suppa's policies, all of the

---

[4] For the convenience of the Court, we have reproduced certain pertinent portions of Suppa's testimony in the Appendix A, *infra*, pp. 1a-11a.

No. 2 oil which was at issue, sold by Pedroni Fuel, was sold to companies that Suppa determined were licensed 637 companies. Therefore, Suppa determined that those sales were to be made tax-free. (App. A, *infra*, pp. 3a-5a, 7a-11a)

B. Furthermore, the government argues (Br. in Opp. 9) that there is no evidence from which a reasonable jury could conclude that Petitioner made "full disclosures to his accountant of the fact that the sales were in actuality to PetroPlus . . . ." But this point is of no legal consequence for two separate reasons.

First and most important, the government's claim that Petitioner failed to make full disclosure to his accountant rests solely upon its hypothesized recharacterization of Pedroni Fuel's sales as sales to PetroPlus, rather than as listed on the Stipulation between the parties. (App. B, *infra*, at pp. 12-13)[5] In the government's view, Petitioner's failure to tell his accountant that the sales were to PetroPlus invalidated his reliance upon the accountant's advice. But the government's after-the-fact legal recasting of the transactions cannot retroactively invalidate Petitioner's reliance on his accountant's advice on the ground of lack of disclosure. A jury should be told to decide the issue whether all material facts were disclosed to the professional adviser, if that issue is contested.[6] The fact that both sides have conflicting legal

---

[5] For the convenience of the Court, we have reproduced a Stipulation submitted to the trial court that identified the 78 sales by Pedroni Fuel. Pedroni Fuel was involved in approximately 7 percent (both by volume and number) of the 1,011 total sales at issue over a three-year period. (App. B, *infra*, pp. 12a-13a; *See also* Pet. 2-3 and n. 2) All 78 sales were to entities licensed by the IRS to purchase tax free. (App. A, *infra*, p. 10a and App. B, *infra*, pp. 12a-13a)

[6] The record indicates that disclosure of the material facts to Suppa was not effectively contested at trial by the government. A single government expert supplied any basis for claiming that Pedroni Fuel's sales were sales to PetroPlus rather than those to the companies in the Stipulation. This IRS agent had no excise tax experience prior to his participation in the

theories does not bar the submission to the jury of the defendant's affirmative defense. As a standard treatise has noted:

> Whether [the] Defendant acted in good faith for the purpose of truly seeking guidance as to questions about which [*he*] [*she*] made a full and complete report or disclosure and whether [*he*] [*she*] acted strictly in accordance with the advice received, are all questions for you to determine.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §919.08 (2000 ed.).

Second, the fact of the matter was that PetroPlus was itself licensed to receive tax-free fuel. (*E.g.*, A2335). Therefore, it was legally irrelevant and irrelevant to Suppa whether the sales were reconstructed after the fact pursuant to the government's legal theories. Transfers of tax-free product to PetroPlus, a licensed company, were totally tax-free from a licensed supplier's viewpoint, (A2225; 2395) as IRS Commissioner Goldberg's spokesman to the oil industry and the draftsman of IRS Notice 88-30 confirmed. (A2557; 2555-6) (*See also* Pet. 4, n. 4). When Petitioner was secretly tape-recorded by government agents, he stated that it did not matter whether sales were to PetroPlus, a licensed company, or to any other licensed company—taxes were simply not involved in sales from Pedroni Fuel's viewpoint. (*E.g.*, A1359). The fact that oil was transferred to the possession of another licensed company was irrelevant to Petitioner's accountant and did not affect his tax decisions or tax advice. The government's cross-examination failed to prove that

---

investigation of this case. The agent also conceded that various sales to the companies on the Stipulation were in fact sales to those parties. (A2331). Moreover, three defense experts, including the former IRS spokesman to the oil industry, explained that Petitioner's sales were tax-free as reflected on the records (A. 2550-2551, 2578-2579).

Suppa was unaware of such stock transfers or that they were a material fact to him.

C. Finally, the government argues (Br. in Opp. 10, n.5) that the issue of good-faith reliance on the accountant's advice was not specifically addressed by the court of appeals because Petitioner never developed the argument until a post-argument letter brief. Once again, the government mischaracterizes the proceedings below. There can be no doubt that Petitioner raised these precise issues in the district court and in the court of appeals. In the briefs submitted to the court of appeals, Petitioner essentially echoed the argument we make here relating to his reliance on his accountant. *See* Appendix C, *infra*, pp. 13a-14a.[7]

The argument that Petitioner was entitled to a jury instruction on his defense of good-faith reliance on a tax professional was also raised in the district court and raised in his requested jury instructions. The instructions requested by Petitioner on this very issue, all of which were refused, are reproduced in Appendix D, *infra*, p. 15a.

In sum, there is a substantial basis in the record for the Court to rule on the question whether Petitioner was entitled to a jury instruction as to his defense of good-faith reliance on a tax professional. What is more, there is no doubt that the issue was fully presented to both courts below. The importance of the question for the conduct of criminal tax prosecutions therefore warrants review by this Court.

CONCLUSION

For the reasons stated above and in the Petition, the Petition for a writ of certiorari should be granted.

---

[7] For the convenience of the Court, we have reproduced the pertinent portions of Petitioner's briefs in the court of appeals in Appendix C, *infra*, pp. 13a-14a.

Respectfully submitted,

JAMES A. PLAISTED *
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300

STUART A. SMITH
551 Madison Avenue
New York, New York 10022
(212) 759-8285

* Counsel of Record

Attorneys for Petitioner

APPENDICES

APPENDIX A

EXCERPTS FROM TESTIMONY OF RON SUPPA

Q. Mr. Suppa, where are you presently employed?
A. I'm presently employed at Pedroni Fuel Company. . . .
Q. How long have you been employed there?
A. 20 years.
Q. What's your position there?
A. I'm the controller.
Q. And does Pedroni Fuels have a Tax Department?
A. Yes, they do.
Q. Who is it?
A. Me.
Q. How long have you been the Tax Department and the Controller at Pedroni Fuels?
A. 20 years.

(A 2520 at T. 14381 line 24 to 14382 line 14)

Q. And when did you get your CPA license?
A. 1969.
Q. And do you have any other, do you have a private practice as well?
A. Yes, I do.
Q. And what is the nature of your private practice?
A. A small public accounting firm in Vineland, New Jersey.
Q. And how long have you been operating as a small public accounting firm in Vineland?
A. 19 years.
Q. And prior to your own practice, did you work at any other accounting firm?
A. Yes, I was with a public accounting firm for 13 years and was a partner in that firm.

(A 2520 at T. 14383, line 3 to line 16)

Q. During the time period, and all my questions are addressed to the time period if I forget to say it.

A. Yes.

Q. During the time period 1989 to 1993, did Pedroni Fuel ever buy two oil or diesel oil tax-paid?

A. No.

Q. Why not?

A. Because we had a 637 and we purchased it [no. 2 oil] without the taxes.

Q. And did you ever sell either two oil in a taxable transaction, or sell product as diesel fuel or as—yeah, as diesel fuel to truck stops?

A. Yes.

Q. And so under those circumstances, would you be selling product that you would obtain tax-free?

A. Yes.

Q. What did you do with the taxes you would collect?

A. The taxes would obviously go right into our operating account, and then in turn when they were due to the taxing authority, sent directly to the taxing authority.

A. And who was responsible for making the decisions in that regard?

A. Myself.

Q. And what if any, efforts did you use to make sure that people who should've been paying the taxes to you, actually paid them?

A. Well, I was preparing the necessary tax reports and I would bill the customer the taxes if they were in place - - actually the credit department would see that the bills were paid, but I was responsible for making sure that the transaction, a taxable transaction was, was billed as taxable.

(A2521-22 at T. 14387, line 19 to 14388, line 25)

Q. Now, the companies that are listed on this stipulation and the chart were, what relation did they have to Pedroni Fuels?

A. They would be customers of Pedroni Fuel.

Q. And did they purchase fuel from Pedroni Fuels?

A. Yes.

Q. Were there—did you make a determination with, did you review yourself, in fact, the government's sum-tax schedules?

A. Yes, I did.

Q. To try to count up the different transactions that related to Pedroni Fuels?

A. Yes, I did.

Q. And these numbers on the stipulation and on that chart reflect the government's , the summary of the government's sum-tax schedules as they've represented it, correct?

A. Correct.

Q. And did you review the Pedroni Fuels 637 Files for these particular companies?

A. Yes, I did.

Q. And who was it who made the decision that the sales to Petro-Lux were and should be treated as tax-exempt sales?

A. Myself.

Q. And what documents did you use to make that decision?

A. I had a valid 637, I had the licensing from the state of New Jersey, and the federal exemption certification, certifications.

Q. Right now we're talking about federally tax-exempt for the . . .

A. Correct.

Q. For my questions presently, during this period. And were there , there were a number of sales to Kings Motor Oil as well, correct?

A. That's correct.

Q. Who made the decision that those sales should be federally tax-exempt

A. I did.

Q. And what did you base that on?

A. I had a valid documentation, 637 and exemption certificate.

Q. And whose responsibility in the company was it to make those kinds of taxing decisions?

A. Myself.

Q. Now, with respect to American Minority Petroleum, Hillcrest and Madeno, who made the decision within Pedroni Fuels that those transactions and sales should be treated as tax-exempt, federally tax-exempt?

A. I did.

Q. Now, and in each case did you base it on your 637 file?

A. Correct.

Q. Would you in these cases also in the ordinary course follow up with the Internal Revenue Service and check with them?

A. Yes.

Q. Now, if a tax—withdrawn. If a company has a 637, do they have a right to ask you to sell them tax-exempt?

A. Yes.

Q. Who gives them that right?

A. Internal Revenue Service when they issue the 637.

Q. And was there ever a time that you can recall that Richard Pedroni countermanded the decision you made that transactions were tax-free?

A. Never.

Q. Did he ever concern himself on those topics with you at all?

A. No.

(A2523-24 at T. 14394, line 8 to T. 14396, line 24)

Q. Now, did Pedroni Fuels maintain 637 files?

A. Yes.

Q. Who was responsible for those files, gathering and maintaining them?

A. Myself and Jim Hughes.

Q. And what is a 637?

A. It's a license, registration, license issued by the Internal Revenue Service when the customer actually meets certain qualifications, they can purchase product tax-free.

Q. And what, if anything in addition to gathering the 637, did you do to make sure that Pedroni Fuels was properly handling the decision on whether a transaction was tax-free or whether they should collect the taxes?

A. Well, we were also required to obtain exemption certificates from the various customers, and also when we received the 637s, we , I would make the necessary phone call to the excise tax coordinator to verify that the 637 was valid.

Q. Now, did you during this entire period and - - withdrawn. In the very beginning of this period were you making calls to the IRS?

A. At the beginning, no.

Q. What caused you to begin making call to the IRS?

A. We had an excise tax auditor from Internal Revenue Service, and during the audit he mentioned to me that it might be wise for me to start verifying that these 637s were valid.

Q. And did he talk to you specifically about calling the IRS?

A. Yes.

Q. What did he tell you?

A. Well, he recommended that I would call Mountainside and obtain the, the verbal verification.

Q. And did you, did you follow that suggestion?

A. Yes, I did.

Q. Did you discuss that suggestion with anybody else at Pedroni Fuels?

A. Yes, we, I discussed it with Richard Pedroni.

Q. Did Pedroni Fuels adopt a policy with respect to calling the IRS on 637s after these events?

A. After those events we called on everyone.

Q. And was there anybody else besides yourself who would call from time to time?

A. Jim Hughes would call from time to time.

(A2522-23 at T. 14389, line 21 through T.14391, line 15)

Q. Now, what if any, financial incentive did Pedroni Fuels have to collect taxes, state and federal, on excise transactions?

A. Well, they had quite a stake in it, because by collecting the tax, we actually improved our cash flow because we had the use of the funds from anywhere from 15 to 45 days until the taxing authority required the payment.

Q. And was there a policy at Pedroni Fuels as to what would be done if there were questionable certifications or questions about the supporting documents for a nontaxable transaction?

A. We would initially try to clear up those questions, but the end result was that there was still some doubt and we, and when in doubt we collected the tax.

Q. And whose policy was that?

A. Richard Pedroni, Pedroni Fuels and myself.

(A2523 T. 14392, line 24 to T.14393, line 14)

State taxes

Q. Now, with respect to state taxes, what is the gross receipts tax?

A. It's a tax on petroleum products sold in the State of New Jersey.

Q. And what, if anything did—withdrawn. Who is obligated to collect and pay over that tax to the State government?

A. The final sale, wholesaler sales, either the distributor or the licensed wholesaler.

Q. Now, what, if anything, did you do in your capacity as Comptroller to make a decision as to whether or not you should charge companies who were buying in bulk from Pedroni Fuels the gross receipts tax?

A. I obtained from the customer a copy of their direct payment certificate which entitles them to pay the gross receipts tax directly to the state and instead of to us.

Q. And did you obtain that copy of that document for each of the companies listed, Petro-Lux, Kings Motor Oil, American Minority Petroleum, Hillcrest and Madeno?

A. Yes.

Q. And can you tell the jury, if a company you're selling to has a direct payment certificate, do they have a right to get the product from you free of the gross receipts tax?

A. Yes.

Q. Who gives them that right?

A. State of New Jersey.

Q. Now, with respect to the state excise taxes, during this relevant time period what was the point of taxation?

A. The tax was charged at the final sale from the final wholesaler to the retailer.

Q. And are there, and I forgot to do this—let me—well first with respect to the state taxes, are there—withdrawn. Let me go back if I can to the federal 637 system. Are there, in addition to 637s, are there other exemptions from excise taxes in the federal system besides just the 637?

A. Yes.

Q. Could you tell the jury what some of those are?

A. Are there exemptions for state and local government purchases, exemptions to nonprofit organizations, a certification that the product is going to be used for off highway use.

Q. And . . .

A. Marine vessels.

Q. I take it there are a number of them?

A. Yes.

Q. Would you make an effort with respect to each customer to research the different exemptions if you thought they were relevant or if it's brought to your attention?

A. Absolutely.

Q. Was that anybody else's job at Pedroni Fuels besides yours?

A. No.

Q. Now, going back to the state system, during the period 1989 to 1992, I think you said that the point of taxation was the last wholesaler who sold to a retailer. Did that system change in July of 1992?

A. No.

Q. Was there ever a time that the point of taxation in the state system was shifted to the retailer?

A. Oh, yes, that's right, in '92, now, end users must obtain a seller/user license in order to pay their taxes directly to the state rather than for the wholesaler distributor to have to pay the tax.

Q. But—and so in the normal course after July 1992, the retailer, that is a truck stock, was obligated to pay the tax unless they had a license, correct, a seller/user license?

A. Yes.

Q. All right. Now, on the stipulation as you can see there are no Pedroni Fuel sales after June of 1992, so I'm going to, on the state system, address questions to you for the period 1989 to July of 1992, the period before that change in the state system, okay?

A. Okay.

Q. Were there, what was the point of taxation in that period from 1989 up to July of 1992?

A. Unless you had an exemption or was registered with the state for either as a distributor or jobber, then we charged the tax.

Q. Okay. But what was the point of taxation in general?

A. The end user, from the wholesaler to the end user.

Q. All right.

A. The last wholesaler to the end user.

Q. Now, if a company that Pedroni Fuels was selling to was registered with the State of New Jersey as a wholesaler, did you have to charge them the tax?

A. No.

Q. And was there a publication put out by the state that listed names of people registered with them?

A. Yes. The state would publish a catalog every six months with a list of jobbers, wholesaler distributors who have licenses, importers, exporters.

Q. And did you use that list in your job at Pedroni Fuels in determining whether or not a transaction before July of 1992 should have state excise taxes charged on it or not?

A. Yes.

Q. Did you also endeavor to obtain copies of various state licenses from customers, people you're selling oil to?

A. Always.

Q. Now were there, similar to the federal system, were there also other exemptions besides this registration and licensing exemptions that would apply to your decision as to whether or not to charge state taxes?

A. The same, some of the same similar exemption, in this case the federal government or the state agencies would not be charged the tax. Also off highway use, farmers, nonprofit organizations.

Q. Are there a long list of other ...

A. Also, yes.

Q. . . .exemptions?

A. Correct.

Q. And in making your decisions as to taxability, would you look at those if it seemed like they may apply to you?

A. Yes, that's correct.

(A2524 T. 14396, line 25, Line 10 to T. 14401, line 15)

Q. Now, these, these 637 files were maintained in your regular course of business, correct?

A. That's correct.

Q. And you used them for what purpose?

A. To determine the taxability of transactions.

Q. And were these companies that are listed on the Stipulation on the board, were they real companies?

A. Yes they were.

Q. How do you know that?

A. 637 were issued by Internal Revenue.

Q. So you relied on them in making those decisions?

A. Absolutely.

Q. Now, Mr. Stahl asked you about the handwriting on the, on the fourth page of D-PED-126. Did - - whose handwriting is it again?

A. Myself.

Q. And what does it indicate to you?

A. That I spoke to Mary Person at Mountainside. The Executive—Federal Excise Tax Coordinator to confirm the validity of the 637.

Q. And that means you personally called?

A. That's correct.

Q. And if anybody asked you if you had done that job, you would have told them what?

A. That I called and confirmed the validity, and that it was acceptable.

(A2526 at T. 14406, line 24 to T. 14407, line 24)

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT, ET AL.

CRIMINAL NO. 95-388 (JEI)
HON. JOSEPH A. IRENAS

STIPULATIONS

The defendant, Richard Pedroni, and the United States hereby stipulate and agree that the Sum Tax Schedules introduced by the government as Exhibits Sum-Tax 16A, 16B, 16C and 16D represent transaction where Pedroni Fuels issued sales invoices to the following companies. The Sum-Tax schedules 16A-D reflect the following number of transactions during the time periods identified herein:

1. Petrolux

   January 11, 1990 to February 28, 1991 (15 Transactions)

2. Kings Motor Oil

   January 18, 1990 to October10.1991 (14 Transactions)

3. American Minority Petroleum

   October 25, 1991 to January 13, 1992 (16 Transactions)

4. Hillcrest

   January 17, 1992 to May 13, 1992 (18 Transactions)

5. Madeno Transportation Company

   May 21, 1992 to June 29, 1992 (15 Transactions)

There are no Pedroni Fuels invoices to any other company in the Sum Tax Schedules introduced by the government. Pedroni Fuels is involved in 78 transactions out of the 1,011 transactions reflected in their Sum Tax exhibits and charged in the indictment. The 78 transactions involve 46,872,000 gallons out of a total gallonage of 667,000,000 which is approximately 7% of the total gallonage involved in this case.

Walder, Sondak & Brogan, P.A.

By: /s/ James A. Plaisted
JAMES A. PLAISTED, ESQ.
Attorneys for Richard Pedroni

U.S. Attorney for District of New Jersey

By: /s/ Stephen Ponticello
STEPHEN PONTICELLO, ESQ
Special Assist. U.S. Attorney

APPENDIX C

Excerpts From Richard Pedroni's Initial Brief in the Court of Appeals:

> Pedroni's good faith reliance upon his CPA and a system they created to insure compliance with all tax obligations rebutted Pedroni's criminal intent as to all charges. Yet, the Trial Court refused to explain that point to the jury. (Fn 10) Defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence, and the Trial Court's failure to do so requires a new trial. [Citing, among other authority, *Mathews v. the United States*, 485 U.S. 58, 63 (1988).]
>
> The Supreme Court has held a good faith reliance upon a professional advisor's sufficient to defeat the imposition of a tax penalty in a civil negligence case. *United States v. Boyle*, 469 U.S. 241, 251 (1985). If such reliance serves to rebut a charge of negligence when the taxpayer bears the burden of proof by a preponderance of the evidence, a fortiori, it is sufficient to establish the absence of criminal intent in a case where the government must prove its case beyond a reasonable doubt.

Excerpts From Richard Pedroni's Reply Brief in the Court of Appeals:

In Petitioner's Reply Brief, this argument was similarly emphasized. One argument caption stated (p. 14):

> A. The Trial Court Failed to Give Pedroni's Good Faith Defense Instruction *Concerning his Overall Reliance On His Accountant* And The IRS's Advice.

In pertinent part, the text of the Reply Brief under that caption stated (Reply Br. 19):

> Pedroni likewise merited and deserved a charge on his good faith defense. His accountant testified at length about their joint efforts to honor and adhere to the IRS

policies for suppliers of fuel. Pedroni's accountant testified about their establishment of a system with double protection. They sold (a) non-taxable No. 2 oil to (b) licensed companies. IRS personnel and other industry experts testified that in fact the professed belief of Pedroni and his accountant and their practice more than complied with accepted and careful practice for legitimate oil suppliers at the time. Not only did Pedroni prove that he intended to satisfy the law and put in a plan to do so, but the plan that was instituted was approved by the IRS and the state. (Scheffler's and Suppa's testimony) At the least, Pedroni was entitled to an instruction that his good faith was a defense. (Reply Br. 19).

APPENDIX D

Excerpts from Richard Pedroni's Requests For Jury Instructions:

> Defendant, Richard Pedroni has introduced evidence that he relied on the advice of an accountant, Mr. Suppa. If you find that Richard Pedroni in good faith placed reliance on this accountant to make sure that Pedroni Fuels acted properly with respect to all tax laws, or such evidence raises in your mind a reasonable doubt as to Mr. Pedroni's guilt, you should find him not guilty. (A769)
>
> If you find that Richard Pedroni placed reasonable reliance on Mr. Suppa to make sure that Pedroni Fuel acted properly with respect to all tax laws, then you should find him not guilty. (A764)
>
> Any good faith belief, as referenced above, would be a defense to all charges . . . (A764)
>
> If you find that the taxability of these transactions was determined by someone other than a particular defendant, that any such defendant was not involved in tax decisions, then you should consider that fact in determining whether the defendant acted in good faith, or whether he possessed a criminal intent to join a conspiracy to cheat on taxes and knowingly and willfully violated the State and Federal tax laws as charged.
>
> If you find that defendant Richard Pedroni believed in good faith that the procedures established at Pedroni Fuels to comply with the Internal Revenue laws and the tax law of the State of New Jersey, was adequate to insure that Pedroni Fuels was complying with its duties under the tax laws, you should find him not guilty. (A769)